BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CALVIN D. REEDY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,011,943
PHILLIPS SOUTHERN ELECTRIC	)	
Respondent	)	
AND	)	
	)	
MIDWEST BUILDERS' CASUALTY MUTUAL CO.	)	
CONTINENTAL WESTERN INS. CO.	)	
LIBERTY MUTUAL INS. CO.	)	
Insurance Carriers	)	

ORDER

Both Claimant and Respondent and one of its carriers, Continental Western Insurance Company requested review of the December 17, 2009 Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on April 16, 2010.

APPEARANCES

Brian R. Collignon, of Wichita, Kansas, appeared for the claimant. Wade A. Dorothy, of Overland Park, Kansas, appeared for respondent and Midwest Builders' Casualty Mutual Company (Midwest Builders). Michael D. Streit, of Wichita, Kansas, appeared for respondent and Liberty Mutual Insurance Company (Liberty). Douglas D. Johnson, of Wichita, Kansas, appeared for respondent and Continental Western Insurance Company (Continental Western).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award with one exception. At oral argument, claimant advised that contrary to the stipulations in the Award, he contends the date the last series of injuries commenced was March 15, 2005 (rather than August 5, 2004) and continued until February 26, 2006,

claimant's last date of work. Respondent's counsel (each of the three of them) did not object to this amendment.

INTRODUCTORY STATEMENT

Although this claim bears a single docket number, it purports to involve four separate accidents, each was pled as a series of injuries. Claimant contends the first three stem from an acute injury but are followed by a series of injuries.[1] The fourth and final accident is alleged to be a series without any single distinguishing event.[2] Each accident spans a different period but claimant's employer remained the same during all relevant periods of time. However, as is often the case in these matters, the respondent's carrier changed. Accordingly, the ultimate responsibility for any permanency is wholly dependent on the date of accident. The first three of these accidents were filed collectively on July 25, 2003. This filing was amended a number of times and ultimately the 4th accident was added and pled as a series covering the last 11 months of claimant's employment with respondent.

The parties agree that Midwest Builders' coverage began April 1, 2001 and continued to December 31, 2003. Liberty Mutual assumed the coverage as of January 1, 2004 and was on the risk until November 1, 2004, followed by Continental Western. Continental Western covered respondent at all relevant points of time from November 1, 2004 forward.

ISSUES

Except for the commencement date of the 4th accident, the parties' stipulations are contained within the Award and are specifically adopted herein. The ALJ declined to award claimant benefits for the first accident as he concluded claimant's injury occurred on March 14, 2001 (not over a series beginning in March 2002 as claimant alleged) and that claimant failed to assert a timely written claim as to that accident.[3] The ALJ did, however, grant claimant a 5 percent whole body functional impairment for the 2nd accident occurring on April 8, 2003 and a 1 percent impairment to the right arm for injuries suffered on June 12, 2003 in the 3rd accident. As to these two accidents the ALJ rejected claimant's

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[1] The first accident is alleged to have occurred in March 2002 and continuing each and every working day thereafter. The second accident is alleged to have occurred on April 8, 2003 and continuing each and every working day thereafter. The third accident is alleged to have occurred on June 12, 2003 and continuing each and every working day thereafter.

[2] The fourth and final accident is alleged to have commenced March 15, 2005 and continuing each and every working day thereafter.

[3] The record indicates that another insurance carrier was on the risk during the period immediately before April 1, 2001. The record also appears to indicate that Wausau was that carrier and that Wausau and respondent were involved in providing care to claimant at least at some point before April 1, 2001, when Midwest Builders assumed the risk. Strangely, Wausau has never been involved in this claim.

contention that he suffered a series of microtraumas. He did, however, find claimant established a series of injuries occurred during his last period of employment (4th accident) and went on to award a 69 percent permanent partial general (work) disability under K.S.A. 44-510e(a).[4] Because the dates of accident for this last period fell within Continental Western's coverage period, the entirety of the work disability award was entered against respondent and Continental Western.

The ALJ also denied claimant an award for the medical treatment provided by Dr. Lucas for arthritic complaints to his thumbs, including surgeries to fuse the thumb joints. The ALJ concluded that Dr. Lucas' testimony did not establish that claimant's need for treatment was causally connected to his work activities. Thus, those benefits were denied. Claimant's appeal as well as respondent and Continental Western's followed.

Succinctly put, respondent and each of its carriers do not dispute that claimant has sustained a number of acute injuries while working for respondent and that he has continued to receive care from a variety of medical providers over a lengthy period of time. Indeed, respondent (along with its carriers Midwest Builders and Liberty Mutual) take no issue with the ALJ's findings on the first three accidents. They agree with the ALJ's analysis as to the lack of timeliness of claimant's single acute injury in March 2001 as well as with the ALJ's impairment findings in the 2nd and 3rd accidents. Accordingly, they contend those aspects of the ALJ's Award should be affirmed.

Respondent and Continental Western argue that claimant failed to establish an accidental injury arising out of and in the course of his employment as well as timely notice of such an accident for the period March 15, 2005 and ending as of February 26, 2006. And for this reason, the ALJ's Award should be reversed as it relates to the 4th accident.

Lastly, respondent and each of its carriers ask the Board to affirm the ALJ's conclusions as to Dr. Lucas' treatment.

In contrast, the claimant asks the Board to modify the ALJ's Award in a number of ways. Claimant contends that each of these injuries is not a single acute injury, but rather is the result of a series of microtraumas inasmuch as claimant continued to work as a "working supervisor" during his entire period of employment with respondent. Thus, the individual acute injuries merely signal the start of one of a number of his series of injuries (and resulting functional impairments), the last of which effectively removed him from his job, giving rise to a permanent total or permanent partial general (work) disability. Claimant

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[4] The ALJ found claimant had a 100 percent wage loss and a 69 percent task loss. However, in awarding a work disability, he failed to average the 69 percent task loss with the 100 percent wage loss. Instead, he simply awarded a 69 percent work disability. Thus, if work disability is awarded, this mathematical error must be corrected. None of respondents disputed the appropriateness of the task loss finding and under present case law, claimant's actual wage loss is the appropriate percentage used to determine the resulting work disability finding. (See *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009)).

specifically contends that as to the first accident, he established a series of microtraumas as well as timely written claim and that he has adequately proven both timely notice and a compensable series of microtraumas during his last 11 months of work for respondent. Claimant also urges the Board to find that he is permanently and totally disabled under K.S.A. 44-510c.

Claimant urges the Board to modify the ALJ's Award, increasing the impairment ratings in each of the accidents, granting claimant an award for 10 percent to the whole body in the 2nd accident, 20 percent to the right upper extremity in the 3rd accident, and granting him permanent total disability benefits in the 4th and last accident. As for the first accident, he steadfastly maintains the accident was a repetitive series of accidents that did not begin until March 2002 and continued, thus curing any timeliness issue. Accordingly, claimant urges the Board to reverse the ALJ's denial of this aspect of his claim and award him 10 percent to his left upper extremity. Finally, claimant asks the Board to modify the ALJ's finding as to Dr. Lucas' treatment and find that treatment was reasonable and necessary to cure and relieve him of the effects of his injury.

The issues are numerous but were succinctly itemized in the ALJ's Award:

1. Whether claimant met with personal injury by accident in March 2002 and each and every working day thereafter.

2. Whether claimant's injuries of March 2002 and each and every working day thereafter arose out of and in the course of his employment.

3. Whether claimant met with personal injury by accident on August 5, 2004 [sic][5], and each and every working day through February 26, 2006.

4. Whether claimant's injuries by accident on August 5, 2004 [sic], and each and every working day through February 26, 2006, arose out of and in the course of his employment.

5. Whether notice was provided for the accident of March 2002.

6. Whether notice was provided for the accident of August 2004.

7. Whether timely written claim was made for the accident of March 2002.

8. Claimant's average weekly wage for the date of accident of August 5, 2004.

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[5] Although the beginning dated listed in the Award was August 5, 2004, the parties have now stipulated the commencement of the last series was March 15, 2005.

9. Nature and extent of claimant's disability, if any.

10. Whether claimant is entitled to medical, unauthorized, and future.[6]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant worked for respondent as an electrical contractor laborer since 1990. While working for respondent, most particularly during 2002 to 2006, claimant's duties included running heavy construction equipment, hand digging, operating a sledgehammer, pulling wire through pipes, lifting as much as 100 pounds at a time as well as using hand operated machines and tools.[7] All these activities are considered physically demanding. Although claimant was promoted to a supervisory position, he testified that he continued to do all of his normal work duties delineated above. Although respondent and Continental Western dispute this characterization and assert that claimant was merely a figurehead, that 90 percent of his work activities were sedentary and supervisory in nature, this assertion is based upon a physician's note and is discredited by claimant's testimony.

He is now in his 50's and as of February 26, 2006, he was terminated from his job with respondent. There is no dispute that he presently bears significant physical ailments that involve both upper extremities and his entire spine. There is likewise no dispute that at various times during his working career he has sustained acute injuries to various parts of his body, but returned to work at his normal job duties. In addition to the procedural challenges to claimant's claim, the more difficult and challenging question is whether and to what extent his complaints are causally connected to his work activities and alleged accidental injuries.

Principles of Law Applicable

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[8] "'Burden of proof' means the burden of a party to persuade the trier of

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[6] ALJ Award (Dec. 17, 2009) at 4.

[7] R.H. Trans. at 15-17.

[8] K.S.A. 44-501(a).

facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[9]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[10]

Claimant's Left Upper Extremity – alleged March 2002 injury (including each and every working day thereafter)

Claimant initially filed this claim alleging 3 separate accidents, the first occurring "3/02" and references "[p]ulling a cable".[11] Claimant did not allege a series of injuries relating to March 2002 until much later. At the regular hearing, claimant testified that he started to notice problems with his left thumb, his left hand and elbow as well as shoulder problems in March 2002. According to claimant, there was no specific accident, the problems just slowly emerged.[12]

The ALJ noted the medical records coming from Dr. Parula P. Raghavan (and stipulated into evidence) reflect that claimant sought out treatment for a work-related injury to his left thumb in March 2001. Dr. Raghavan's office note indicates claimant "jammed his [left] thumb while he was at work"[13] two months earlier, presumably in January 2001.[14] When claimant's symptoms to his thumb did not improve she referred him to Dr. Anthony G.A. Pollock, who identified "some degenerative arthritis at the base of his thumb".[15] It seems that all of his treatment was conservative and as best as can be gleaned from the record, he was never given a rating for this injury.[16] Although there were some periods that

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[9] K.S.A. 44-508(g).

[10] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[11] E-1 Application for Hearing (filed July 25, 2003).

[12] R.H. Trans. at 21.

[13] Stipulation (filed Sept. 17, 2009) at 17 (Dr. Raghavan's Mar. 15, 2001 office note).

[14] This event occurred during respondent's coverage period with Wausau, a carrier that is not present in this litigation.

[15] Stipulation (filed Sept. 17, 2009) at 18 (Dr. Pollock's Apr. 25, 2001 letter).

[16] Dr. Pollock testified that as of 2001, he doesn't believe he assigned the claimant any work restrictions or an impairment rating. Pollock Depo. at 18.

claimant self limited his work activities, most likely when his symptoms were the worst, the greater weight of the evidence suggests that claimant appears to have continued to work his regular duty for the most part.

From there, the medical records show that claimant's symptoms expanded from just the left thumb. He began to complain of left elbow and upper extremity problems and pain into the neck. On April 15, 2002, Shane Phillips, one of respondent's owners, contacted Dr. Raghavan, who was apparently the authorized treating physician, and advised that claimant was not improving. Mr. Phillips specifically asked Dr. Raghavan to refer claimant to another physician other than Dr. Pollock. In the meantime, claimant returned to Dr. Raghavan with his ongoing complaints of left elbow and arm pain, left wrist and thumb pain as well as spine pain. Dr. Raghavan advised claimant to "avoid any kind of strenuous work for at least a week" until she could see him again.[17] Her office notes suggest the possible diagnoses of "1. Cervical osteoarthritis with radicular symptoms. 2. Left elbow osteoarthritis and epicondylitis. 3. Left wrist osteoarthritis - ? Carpal tunnel syndrome - ? Cervical nerve pinch."[18]

On June 28, 2002, a representative from Wausau (the carrier on the risk at the time of claimant's acute thumb injury in January 2001) authorized a CT scan of claimant's left upper extremity and neck. This was in response to a request by Dr. Raghavan, who indicated "[t]his is an accident stem[m]ing from 3-14-01 when pt [claimant] hurt his thumb."[19]

The initial E-1 (Application for Hearing) in this matter was filed on July 25, 2003. That first E-1 referenced the date "3/02". And although the Application for Hearing has been amended a number of times, none of those amendments contain any reference to the accident which is described in Dr. Raghavan's March 15, 2001 office note. Claimant admits that he never filed a claim against respondent and Wausau for a January 2001 jammed thumb.[20] But both the medical records and claimant's testimony support an ongoing series of injuries to his left upper extremity while working, punctuated by this thumb injury in 2001.

The ALJ noted that:

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[17] Stipulation (filed Sept. 17, 2009) at 25 (Dr. Raghavan's May 7, 2002 office note).

[18] *Id.*

[19] *Id.* at 33 (June 28, 2002 handwritten notes). The date she referred to is the approximate date of Dr. Raghavan's office note. That office note refers to an injury to the thumb "2 months" earlier. Thus, it is reasonable to assume that Dr. Raghavan is referring to the actual injury of January 2001, but erroneously referred to the date of the first encounter with claimant involving that injury.

[20] Claimant's Depo. (Apr. 27, 2005) at 11-12.

> A review of the medical records reveals that the accident actually took place on March 14, 2001, when the [c]laimant sustained a single traumatic accident jamming his left thumb. His treating physicians for this injury were Dr. Parula Raghavan and Dr. Anthony G.A. Pollock.
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> This Court finds that the [c]laimant suffered a single traumatic accident to his left thumb and extremity in March of 2001. **No written Application for Hearing was filed for this accident date until July 23 [sic], 2003.**[21] (Emphasis added.)

He then went on to conclude:

> **This Court finds that no timely written claim was made for an alleged accident occurring in March of 2002 *[sic]*. The [c]laimant's request for benefits for this date of accident are hereby denied.**[22] (Emphasis added.)

Claimant has appealed this aspect of the Award and claims the ALJ erred in his analysis. Claimant maintains that this aspect of this claim was never about a simple thumb injury, although he does not dispute that such an event occurred. To the contrary, claimant contends he sustained a series of injuries to his left upper extremity as a result of the repetitive nature of his work beginning in March 2002. He maintains that respondent (through its carrier) provided treatment and at no time disabused him of his entitlement to treatment for that injury. The injury included his left hand, left elbow and left shoulder and according to Dr. Pedro A. Murati, a physician hired by his attorney to provide an examination and a rating, claimant is entitled to a 10 percent permanent partial impairment to the left upper extremity.

The Board has carefully considered the evidence and finds the ALJ's conclusion on the timeliness of claimant's thumb injury should be reversed and modified. Claimant most certainly continued to work after he jammed his thumb in January 2001. He continued to be treated by Dr. Raghavan, at respondent's direction and there is evidence that his symptoms spread beyond just his left thumb and up into his arm and shoulder. Claimant paints these complaints as evidence of an ongoing series of microtraumas which he sustained as he continued to work. In support of this contention, claimant offers the testimony and impairment ratings offered by Dr. Murati and Dr. Pollock. In fact, respondent went so far as to contact Dr. Raghavan on April 15, 2002 and ask if she could refer claimant to another physician for further evaluation as claimant was not having much improvement of his left thumb and shoulder complaints.[23] From there his treatment continued with Dr. Raghavan who again referred claimant to Dr. Pollock for treatment,

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[21] ALJ Award (Dec. 17, 2009) at 5.

[22] *Id.*

[23] Stipulation (filed Sept. 17, 2009) at 23 (Dr. Raghavan's Apr. 15, 2002 office note).

although it appears that claimant did not return to Dr. Pollock, at least at that point. Nevertheless, Dr. Raghavan's records show that claimant continued to see her with left upper extremity complaints and later, for cervical complaints and that she was prescribing medications and physical therapy for these complaints during June of 2002. In July of 2002 claimant had an MRI of his neck. There is no indication that these treatments were anything but authorized.

At no point during this period of time does the record indicate that claimant was disabused of his right to treatment. In fact, respondent seems to have gone to some effort to secure him additional treatment in the hopes of resolving his complaints.

The written claim statute, K.S.A. 44-520a, provides in part:

> (a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

It is a long standing rule that once medical treatment is provided, the employer and its carrier are under a duty to disabuse the claimant of the intention to continue to provide treatment in order to avail themselves of any timeliness defense.[24]

The earliest writing contained within the record that could serve as a written claim is the E-1 (Application for Hearing) that was originally filed on July 25, 2003. Claimant unquestionably received authorized medical treatment for his injury at least as late as mid-2002 and was never advised that respondent or its carrier no longer intended to provide that treatment. Under these facts, the Board finds that claimant's written claim is timely.

Having concluded that claimant's left upper extremity injury is timely, the Board finds that claimant has established a 3 percent impairment to the left hand (converted from 5 percent to the left thumb) as a result of his January 2001 acute injury. This rating is based upon the opinions of Dr. Salone, who evaluated the thumb injury alone, as opposed to Dr. Murati, who rated claimant's carpal tunnel complaints, which came on later as claimant continued to work. The Board, therefore, finds the Award should be modified to reflect a permanent partial impairment of 3 percent to the left hand as a result of the single acute injury.

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[24] *Blake v. Hutchinson Mfg. Co.*, 213 Kan. 511, 516 P.2d 1008 (1973); *Brant v. Blue Hill Feeders, Inc.*, No. 1,003,336, 2003 WL 21087611 (Kan. WCAB Apr. 04, 2003).

Claimant's Low Back and Left Lower Extremity – alleged April 8, 2003 injury (including each and every working day thereafter)

This alleged injury stems from an event that occurred on April 8, 2003, when claimant was lifting a machine and injured his low back and left leg. There is no dispute the accident occurred on this date and his employer was informed. But much like with the earlier injury, claimant seeks to transform this acute injury into a series of injuries. And as with the earlier injury dating back to January 2001, there is very little to explain how a single lifting accident bears a causal connection to the plethora of other physical complaints that are contained within the medical records entered into evidence or how and why those injuries continued to worsen.

Respondent concedes this April 8, 2003 accident occurred and that claimant was referred to his personal physician, Dr. Raghavan, for treatment. Dr. Raghavan treated claimant conservatively and released him at maximum medical improvement on January 29, 2004. He continued to work his regular duties after this accident, although claimant, at times, has told physicians that he is little more than a supervisor, performing the heavy work only when needed to assist or demonstrate for those he supervises. Yet, when he testifies before the Court or at a deposition, claimant adamantly maintains he was performing all of the work required of his co-workers, work that, by all accounts, involves operating and lifting heavy machinery, pushing and pulling heavy items and pulling large wiring.

Claimant was examined by Dr. Jeanette Salone, a physiatrist, who examined claimant at respondent's request on April 16, 2009. After interviewing and examining claimant, she diagnosed claimant with an acute back strain which warranted a 5 percent whole body impairment (DRE category II).[25] Dr. Murati also rated claimant's acute low back strain at 5 percent but added an additional 5 percent whole body impairment for what he believed was a thoracic strain.

The ALJ was persuaded by Dr. Salone's evaluation of the claimant's impairment and after reviewing the record, the Board agrees with that finding. Both Drs. Murati and Salone found claimant's low back impairment to be 5 percent and neither assigned any impairment to the lower extremity. Indeed, claimant does not voice any significant complaints about the knee. Dr. Murati's assignment of 5 percent to the thoracic spine given the mechanism of injury is largely unexplained. The Board affirms the ALJ's finding that claimant sustained a 5 percent permanent partial whole body impairment.

Claimant's Right Hand – alleged June 12, 2003 injury (including each and every working day thereafter)

[25] All ratings have been issued pursuant to the principles set forth in the 4th edition of the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Both parties agree that claimant sustained a laceration to his right hand on June 12, 2003. He was treated by Dr. Prince Chan and surgery was required to repair the laceration. According to claimant, he last had treatment on his right hand in August 2003.[26] Dr. Salone rated his impairment at 1 percent to the right arm while Dr. Murati rated claimant at 20 percent to the right upper extremity. Both physicians viewed this as a single acute injury and there is simply no support for the contention that claimant sustained a series of accidents to this body part after June 12, 2003.

The ALJ adopted Dr. Salone's opinion and assigned a 1 percent to the right upper extremity. After considering both physicians' opinions, the Board agrees with the ALJ's adoption of Dr. Salone's opinions and ultimate impairment opinions. Accordingly, the ALJ's Award as to this date of accident is affirmed.

Claimant's Repetitive Injury – commencing March 15, 2005
(including each and every working day thereafter)

All parties agree that claimant has, in large part, continued to work for respondent throughout his entire tenure with the company. Although there is a dispute as to precisely how much he was performing the heavier work duties, both respondent and claimant agree that claimant continued to work his regular job duties each and every day. There is, likewise, no dispute that his overall physical complaints expanded far beyond the singular physical complaints that resulted from the singular injuries previously discussed. For example, in March 2001 *in addition to the problem with his thumb*, claimant was complaining of problems in his left arm, left shoulder and neck. Dr. Raghavan referred claimant to Dr. Pollock for an evaluation. These problems continued into March 2002. In June 2002, Dr. Raghavan asked the carrier (presumably Wausau) for additional authority to treat the other areas, including the neck. This was presumably authorized as it was done and there is no indication that it was not authorized.

No doubt due to the intervening accidents (to his low back and his right hand) claimant's treatment seemed to be sidetracked, although claimant testified that he experienced a slow progression of his symptoms in both upper extremities, shoulders, and his neck in addition to the low back and right hand injuries.

Claimant returned to see Dr. Pollock in April 2005 complaining of pain in his neck, back and thumbs. Dr. Pollock reports seeing some swelling on the base of claimant's thumbs so x-rays were ordered. However, the x-rays did not correlate with the level of pain complaints he was seeing during the examination. These complaints expanded and progressed from the thumbs into the hands by October 2005. Dr. Pollock recommended an MRI of the lumbar spine which curiously enough was essentially normal. This

[26] Claimant's Depo. (Apr. 27, 2005) at 15-16.

suggested to Dr. Pollock that claimant was suffering from some sort of arthritic problem.[27] By January 2006, claimant's complaints included bilateral carpal tunnel complaints. The nerve conduction studies confirmed the carpal tunnel diagnoses, with the left being worse than the right.[28]

Dr. Pollock testified that as of January 2006 he believed there was an arthritic process going on that was probably aggravated by claimant's work activities, particularly the pulling of the wires that claimant described to him. In March 2006, claimant underwent a carpal tunnel release to his left hand with a good result, although Dr. Pollock's records reflect claimant's ongoing complaints to his neck and low back.[29] In June 2006, claimant had surgery to his right hand and was purportedly recovering well although claimant continued to smoke and that purportedly slowed his recovery. But Dr. Pollock still believed that claimant had rheumatoid arthritis. Moreover, he referred claimant to another physician for ongoing complaints to his thumb and recommended a thumb fusion. Dr. Pollock assigned restrictions of light duty work, no lifting over 15 pounds and no repetitive squeezing.[30] These restrictions were solely for the problems associated with claimant's hands and the bilateral carpal tunnel condition.[31]

Although he never came to a definite diagnosis regarding claimant's overall condition (other than the bilateral carpal tunnel condition), Dr. Pollock acknowledges that claimant's symptoms increased over the years. He testified that in retrospect, he believed that claimant's bilateral complaints were probably beginning to emerge in 2001 (including the mild arthritic changes to the thumb) and that those complaints may have been the beginning of claimant's problems.[32] In 2001, claimant's complaints related to his left hand, elbow and neck and by the time Dr. Pollock saw claimant again in 2005, those complaints had increased and now included the low back. All the while claimant continued to work, using his hands and arms and his back while performing his regular work duties pulling wire, operating machinery and installing lighting equipment.

Dr. George L. Lucas treated claimant's bilateral thumb complaints beginning in November 2006. He diagnosed claimant with arthrosis of the carpometacarpal joint of the

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[27] Pollock Depo. at 10.

[28] *Id.* at 12.

[29] *Id.* at 13-14.

[30] *Id.* at 16.

[31] *Id.* at 26.

[32] *Id.* at 19-20.

thumb and recommended the left thumb be fused.[33] Although when deposed, he indicated that he held no opinion as to the causal nature of this condition, he testified that work "could" have aggravated claimant's upper extremity complaints.[34] He also said that most of the people he sees with carpometacarpal joint arthritis of their thumbs are not doing repetitive work and he could not necessarily say that the type of work the claimant was doing contributed toward his condition.

Dr. Lucas fused claimant's left thumb in January 2007, but the results were less than optimum. The procedure was repeated with the aid of a bone graft and in June 2008, another procedure was done to transpose a tendon. Dr. Lucas released claimant in September 2008 and advised he would need permanent light duty work in order to continue his employment. Dr. Lucas also testified that this treatment to the thumb was reasonable and necessary to address the claimant's naturally occurring condition which he believed was, in part, accelerated by his work activities.[35]

Dr. Murati also saw claimant again in July of 2008. His report indicates that claimant's complaints had worsened since his first examination in 2004 and in addition to the thoracic and low back complaints, right hand and left carpal tunnel impairments, claimant now voiced complaints of radiating pain into his legs, bilateral rotator cuff strain or tear, right lateral epicondylitis, and myofascial pain in both shoulders and into his neck. His overall permanent impairment increased from 25 percent[36] to 35 percent. The 35 percent is comprised of 8 percent whole body for right carpal tunnel and epicondylitis, 13 percent for left carpal tunnel and the fused thumb, 5 percent *each* to the cervical and thoracic areas of the spine and 10 percent to the lumbar spine. According to Dr. Murati, these impairments are attributable to claimant's repetitive work activities and reflect an aggravation to all of the involved body parts.[37] Moreover, Dr. Murati testified that claimant is essentially and realistically unemployable.[38] Although unemployable, he nonetheless assigned restrictions which included:

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[33] Lucas Depo. at 10.

[34] *Id.* at 8.

[35] *Id.* at 23-24.

[36] The 25 percent is comprised of 5 percent to the thoracic spine, 5 percent to the low back, 12 percent (converted) to the right upper extremity and 6 percent (converted) to the left upper extremity. Dr. Murati attributed these impairments to the accidents which he said occurred in March 2002, April 8, 2003 and June 12, 2003. (All percentages are to the whole body.)

[37] Murati Depo. at 19.

[38] *Id.* at 18.

> [O]nly occasional sit, stand, walk. Rarely bend, crouch, and stoop. Occasional stairs. No ladders. Occasional squat. No crawling. Occasional drive. Repetitive hand controls, with the left occasional but the right frequent. Repetitive grasp and grab, with the left none, with the right only occasional. No heavy grasp with both hands. No above shoulder level work with both hands. No lift greater than 20 pounds, and that only occasionally, and frequently 10. No work more than twenty-four inches away from the body, both arms. And alternate sit, stand, and walk.[39]

According to Dr. Murati, these restrictions would be applicable even if claimant had no upper extremity issues. In other words, the restrictions are for the purposes of his spine impairment, although there is no dispute that claimant has ongoing problems with his upper extremities.[40]

Claimant was also examined by Dr. Paul S. Stein, at respondent's request, in August 2008. According to Dr. Stein's review of the records and claimant's examination, he reported that claimant's symptoms began in 1993 and continued intermittently over the years causing claimant's back to hurt. At one point, Dr. Stein says claimant told him of an injury in the 2000's while he was roofing his house. And he says claimant also told him that from 2004 forward, he was having others do his work that exceeded his capabilities, except when he had to demonstrate. Dr. Stein says that the claimant's history is that 90 percent of his work activity was supervisory and relatively light and was essentially telling other workers what to do.[41] Even so, Dr. Stein agrees that claimant told him his hands, neck and his back were getting progressively worse from 2004 and continuing through 2006. Claimant says he never told Dr. Stein that he was having others perform 90 percent of his work and that he may have misunderstood Dr. Stein. But in any event, claimant maintains he was still performing all of his normal work duties in spite of his litany of physical complaints from 2004 until February of 2006 when he was laid off.

Dr. Stein testified that given claimant's recitation of his job activities, it was his opinion that claimant had sustained no injury after August 5, 2004 but rather, his neck, back and hand symptoms simply got worse, and his shoulders and right elbow became involved as well. He maintains that claimant did not suffer any additional permanent impairment after August 5, 2004 as he was performing almost exclusively sedentary activities. He recommended that claimant have an MRI on his shoulder to see if it was related to the arthritic process. At most, Dr. Stein believed claimant had a 10 percent

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[39] *Id.* at 22.

[40] *Id.* at 23.

[41] Stein Depo., Ex. 2 at 6 (Dr. Stein's Aug. 25, 2008 IME report).

impairment to his right upper extremity as a result of his carpal tunnel complaints, but he was unable to say if that condition and the resulting impairment were work related.[42]

As the ALJ noted, the claimant appeared for a preliminary hearing on August 4, 2005 and asked for additional treatment. At this point claimant was asserting a series of injuries occurring each and every day of his employment. Claimant testified that his back, neck and both hands were progressively irritated by the different sorts of tasks required of him in his regular work duties. Those jobs included lifting, bending, running equipment and digging ditches, all of which he had been doing up to the time of the hearing. He had complaints of pain and numbness in his neck and pain in the lower center of his back.

The ALJ concluded that claimant had sustained an injury "each and every working day through August 3, 2005, and the [r]espondent had notice of the [c]laimant's accident."[43] He ordered the respondent's carrier on the risk at that time, Continental Western, to provide treatment with Dr. Pollock.

As noted above, Dr. Pollock treated claimant's bilateral carpal tunnel complaints and ultimately released him on July 31, 2006. Dr. Pollock had nothing further to offer claimant for his orthopedic complaints. He released claimant to light duty work with no lifting over 15 pounds and no repetitive squeezing.

Following the Regular Hearing, the ALJ reaffirmed his previous analysis and found that claimant sustained a series of repetitive injuries "from March 15, 2005, the date Dr. Raghavan first placed restrictions on the [c]laimant, and each and every working day through his last date of employment which was February 26, 2006, when he was terminated by the [r]espondent".[44] The ALJ went on to grant claimant a 69 percent task loss (based upon an average of the opinions expressed by Dr. Lucas (55 percent) and Dr. Murati (84 percent)). Although the ALJ failed to consider it in his mathematical calculation he found that claimant bore a 100 percent wage loss, a fact that none of the litigants

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[42] *Id.* at 18-19.

[43] ALJ Order (Aug. 4, 2005). At this point in time, it was not unusual to see an injured employee's "date of accident" as a fluid even ever changing date. The law at that point dictated that the last date of injurious exposure determined the legal "date of accident" for purposes of establishing liability. (See *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000); *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).) This law subsequently changed and the date of accident is established by using the criteria set forth in K.S.A. 2005 Supp. 44-508(d).

[44] ALJ Award (Dec. 17, 2009) at 7. The March 15, 2005 date is inaccurate. As noted herein, the date Dr. Raghavan imposed restrictions for claimant's chronic cervical and low back complaints was April 26, 2005, although claimant was evaluated on March 15, 2005.

dispute. Claimant's wage loss was calculated based upon a pre-injury average weekly wage of $700 per week.[45]

As noted before, it is claimant's burden to establish the nature and extent of his impairment as well as all of the critical elements of his claim. Included among those necessary elements is an accidental injury arising out of and in the course of claimant's employment. There is no shortage of medical testimony and evidence in this record bearing on claimant's physical complaints and development of his symptoms during the waning months and years of his employment with respondent. And although there is some dispute as to the reduced nature of his work responsibilities, the greater weight of the evidence indicates that claimant was a working supervisor and at least at some times he was performing heavy work, digging ditches, pulling wires, operating heavy equipment, and all the other duties required of those who do the sort of work claimant was employed to do. It appears Dr. Stein may well have misinterpreted claimant's work duties from 2004 forward and as a result, his opinions are less than persuasive.

It is also well established by the evidence that this work took its toll over the passage of time. And independent of the single acute injuries claimant sustained at any given time, claimant's symptoms progressed slowly and eventually encompassed his upper extremities, including his thumbs, hands and his shoulders; his neck; mid back and low back. Put simply, claimant not only sustained three other compensable acute injuries while working for respondent, he sustained a series of microtraumas which he has alleged began March 15, 2005.

Because claimant has alleged a series beginning March 15, 2005 and continuing until he last worked for respondent, February 26, 2006, and the Board must consider the appropriate date of accident for this series of microtraumas. During the period this claim was being litigated, the legislature enacted a new statute which governs the criteria used to judicially determine a date of accident.

K.S.A. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

> (d) 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner

[45] The parties stipulated to an average weekly wage in connection with the other acute injury dates contained in the record. As to those dates, claimant's wage was sufficient for the statutory maximum weekly benefit for those dates of injury. But as to the claimant's wage on the last date worked, there was no agreement.

> designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. **In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing.** Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[46] (Emphasis added.)

Here, the medical records which were stipulated into the record amply illustrate claimant's ongoing complaints of what we now know is bilateral carpal tunnel syndrome, spine problems and aggravation of what is simply referred to as osteoarthritis. The most critical of these records comes on April 26, 2005, *when Dr. Raghavan*, the treating physician,[47] directs claimant to "avoid lifting over 20-30 pounds", "no repetitive shoveling", "no working requiring repetitive waist bending" and directed claimant to sit 50 percent of the time.[48] Although it seems as though the entirety of claimant's complaints were not fully dealt with until years later, due no doubt to the fact that he continued to work, sustained acute intervening accidents and because the insurance carriers changed, the fact remains that claimant's injuries and resulting damage continued to accrue and Dr. Raghavan, as the authorized treater, restricted claimant's work activities due to his ongoing spine complaints.

The treating physician's decision to restrict claimant's ability to perform his normal work duties satisfies the criteria set forth in the statute and thereby establishes a legal date of accident. Accordingly, the Board finds that claimant's "date of accident" for the last series of injuries is April 26, 2005.

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[46] K.S.A. 2005 Supp. 44-508(d).

[47] Dr. Raghavan was the treating physician on each of claimant's injuries, including the last series of injuries. P.H. Trans. (Aug. 4, 2005) at 17.

[48] Stipulation (filed Sept. 17, 2009) at 54 (Dr. Raghavan's April 26, 2005 office note).

Accordingly, the Board finds claimant sustained a series of accidents and the "date of accident" is April 26, 2005, the date he was first restricted at work for his spine complaints by the treating physician. And based upon the overwhelming evidence contained within the record, from April 26, 2005 until his last date worked, claimant engaged in hand-intensive, heavy labor as a working supervisor for respondent. The extent of his impairment encompasses bilateral carpal tunnel syndrome (post surgical), and shoulder, back and spine pain. According to Jerry D. Hardin, claimant has no transferrable skills and would be limited to sedentary work.[49]

Given the presentation of this case (several acute injuries as well as a long series of microtraumas) it is difficult but not impossible to determine claimant's functional impairment as a result of the final series of injuries, independent of the two acute injuries reflected above. Dr. Murati rated claimant's right carpal tunnel and right epicondylitis at 8 percent to the whole body and the left fused thumb and left carpal tunnel was rated at 13 percent to the whole body. Those ratings, when combined with the neck impairment (5 percent), mid back (5 percent) and the low back (10 percent), total 35 percent to the whole body. Dr. Salone rated claimant's left thumb at 3 percent to the hand and the bilateral carpal tunnel at 2 percent to the whole body. After excluding those impairments previously awarded and considering the physicians' opinions and finding none of them any more or less persuasive than the other, the Board finds that claimant bears a functional impairment of 25 percent as a result of the April 26, 2005 accident.

The calculation of compensation for permanent partial disabilities under the Workers Compensation Act is governed by K.S.A. 44-510e. In relevant part, K.S.A. 44-510e(a) states:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The Kansas Court of Appeals has recently pointed out that the calculation of an employee's work disability is nothing more than a mathematical formula and does not take

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[49] Hardin Depo. (June 24, 2009) at 5-6.

into consideration the reasons for the wage loss.[50] Here, claimant sustained a whole body impairment as a result of his work-related injury (or better said, microtraumas) and is therefore entitled to a permanent partial general (work) disability under K.S.A. 44-510e(a).

The ALJ concluded that claimant's task loss was 69 percent, which was nothing more than an average of the two task loss opinions offered. The Board affirms this finding as it concludes that neither opinion was more persuasive than the other. Thus, an average of the two is reasonable under these facts and circumstances. As for the wage loss component of the equation, the ALJ concluded claimant had a 100 percent wage loss but simply failed to consider that figure in the calculation. Thus, the Board must adjust the work disability calculation based upon that finding. Accordingly, claimant bears an 84.5 percent work disability as of February 26, 2006, his last date of work.

Having determined that claimant's legal "date of accident" was April 26, 2005, the Board must next consider the claimant's average weekly wage on that date, because the benefits due under the Kansas Workers Compensation Act are tied to the "date of accident" and the wages earned as of that sometimes fictitious date are the basis upon which all benefits are calculated.

Here, the parties were unable to agree upon a wage for the last series of injuries. The ALJ found that claimant's wage for this period was $700 per week ($17.50 per hour). He did not include any overtime payments although it is not clear how much overtime he might have worked at any given time. Based upon this record, the Board affirms the ALJ's finding of a pre-injury average weekly wage of $700 per week.

Although the ALJ made no findings with respect to claimant's contention that he is permanently and totally disabled, the Board must nonetheless consider this issue as it was presented to the Board for decision.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

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[50] *Tyler v. Goodyear Tire & Rubber Company*, ___ Kan. App. 2d ___, 224 P.3d 1197 (2010).

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[51]

In *Wardlow*[52], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

After carefully considering the record, particularly the medical records submitted by the parties, the witnesses, in particular the physicians' testimony as well as the claimant's recitation of his ongoing physical complaints, the Board is persuaded that claimant is permanently and totally disabled as that term is used in K.S.A. 44-510c(a). Although claimant testified that he continued to perform his regular duties up to the time he was terminated, Dr. Murati has referred to claimant's hands as "junk" and declared him to be permanently and totally disabled. However, the restrictions that have been imposed by Dr. Murati and Dr. Salone upon claimant do not relate solely to his hands. They also encompass his back as well. Mr. Hardin has opined that claimant is, at best, able to perform sedentary tasks but his past work history provides no transferrable skills. Dr. Salone indicates that claimant should not write for longer than 5 minutes at a time and would need a headset to answer a phone. Under these facts, the Board concludes that claimant is essentially and realistically employable.

Lastly, the Board finds the treatment provided by Dr. Lucas was causally related to claimant's ongoing injuries and therefore the ALJ's finding on that issue is reversed. Dr. Raghavan, the authorized physician, was treating claimant's thumb complaints and through a series of referrals, claimant found his way to Dr. Lucas. And although Dr. Lucas is somewhat equivocal about the causal connection between work and claimant's ultimate need for the arthrodesis in his thumb, he nevertheless testified that work activities would accelerate that condition and that the arthrodesis was reasonable and necessary.[53] Accordingly, the Award is modified to reflect the Board's finding that Dr. Lucas's treatment is part and parcel of this series of injuries occurring on April 26, 2005.

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[51] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[52] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[53] Lucas Depo. at 23-24.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated December 17, 2009, is affirmed in part, reversed in part and modified in part as follows:

Alleged January 2001 accident

The claimant is entitled to 4.50 weeks of permanent partial disability compensation, at the rate of $401.00 per week, in the amount of $1,804.50 for a 3 percent loss of use of the hand, making a total award of $1,804.50. Respondent is responsible for the compensation for injury as the carrier during this accident date has never been involved in this claim.

April 8, 2003 accident

The Board modifies the date of accident to be a single date of accident of April 8, 2003, and affirms the benefits awarded for this accident. Builders is the carrier on the risk during this accident date.

June 12, 2003 accident

The Board modifies the date of accident to be a single date of accident of June 12, 2003, and affirms the benefits awarded for this accident. Builders is the carrier on the risk during this accident date.

April 26, 2005 accident

The claimant is entitled to 64.78 weeks of temporary total disability compensation at the rate of $449.00 per week or $29,086.22 followed by 91.31 weeks of permanent partial disability compensation at the rate of $449.00 per week or $40,998.19 for a 25 percent functional disability, for an amount totaling $70,084.41.

Beginning February 26, 2006, claimant is entitled to permanent total disability compensation at a rate of $449.00 per week not to exceed $125,000.

As of June 28, 2010 there would be due and owing to the claimant 64.78 weeks of temporary total disability compensation at the rate of $449.00 per week in the sum of $29,086.22 plus 91.31 weeks of permanent partial disability compensation at the rate of $449.00 per week in the sum of $40,998.19, plus permanent total disability in the sum of $54,915.59 for a total due and owing of $125,000, which is ordered paid in one lump sum less amounts previously paid. Continental Western is the carrier on the risk during this accident date.

IT IS SO ORDERED.

Dated this ____ day of June, 2010.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Brian R. Collignon, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and Midwest Builders
Michael D. Streit, Attorney for Respondent and Liberty
Douglas D. Johnson, Attorney for Respondent and Continental Western
John D. Clark, Administrative Law Judge